IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

No. 393

GERALD G. BARRY and GEORGIANA G. BARRY,
Petitioners,

vs.

CHRYSLER CORPORATION, CHRYSLER SALES CORPORATION, CHRYSLER MOTOR PARTS CORPORATION, CHRYSLER ILLINOIS COMPANY, and DODGE BROTHERS CORPORATION (original defendants), and BUDD WHEEL COMPANY (Intervenor defendant),
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PER CURIAM OPINION OF CIRCUIT COURT OF APPEALS

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PER CURIAM OPINION OF CIRCUIT COURT OF APPEALS

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Gerald G. Barry and Georgiana G. Barry, respectfully pray for a writ of certiorari to review a *per curiam* decree entered by the United States Circuit Court of Appeals for the Seventh Circuit in a certain proceeding therein wherein said petitioners were Plaintiffs-Appellants and the said above named respond-

ents were Defendants-Appellees. By the said judgment or decree the said Circuit Court of Appeals affirmed a decree of the United States District Court in and for the Northern District of Illinois, Eastern Division, dismissing a patent infringement suit of plaintiffs (the patent owners) against said defendants, for the infringement of claims 6, 7 and 9 of United States Patent No. 1,422,167.

Under the very unusual circumstances presented in this case your petitioners are shown to have been deprived of patented property and denied fundamental constitutional rights to a day in court, due process, and the equal benefit and protection of the laws of the land. Both the District Court and the said Circuit Court of Appeals decided Federal questions of patent law in a way which is not sustained by, but is contrary to, the evidence in this case, and is in conflict with applicable decisions of this Honorable Court.

The said Circuit Court of Appeals entirely failed and refused to exercise its appellate jurisdiction, powers and duties in this case. *It did not decide a single one of the Points of Error or questions presented, referable to the actual record in the instant case of petitioners against the said respondents.* There is not a single reference to the basic determinate facts in evidence, or principles of law applicable to the determinate facts, or to any statement or expression of the District Court,—either as to those in the opinion, or findings, or conclusions, or as to the grounds which were given by the District Court for *its* erroneous decision of non-infringement.

In the trial of this case in the District Court, as shown by the record, the plaintiffs, patent owners, definitely established a very clear case of validity, as well as identity of the infringements by the defendants, of said claims 6, 7 and 9 of the said U. S. Patent No. 1,422,167. *There was no testimony for the defendants, and no rele-*

vant material evidence whatever to the contrary of the proofs established by the plaintiffs, *or to overcome the* well settled *presumptions of validity* which attach and result from the grant of said claims of the patent by the government after due consideration and adjudication by the Patent Office. *The defense was a complete failure.*

The District Court decision of non-infringement was founded on the initial mistaken assumption that, despite the broader, less limited language and terms of said claims 6, 7 and 9, *as granted,* the entire *principle* of the improvement invention should be *impliedly confined* to a mere replica of that "one best" form of its embodiment (the *double* assembled form of the dominating feature part) which is illustrated in the *patent drawing.* This is not the law. It is true the drawing does show in the final assembled wheel combination of elements *two* substantially *identical* and complete *duplicates* of the same supporting body *part* having the novel invention which is measured and secured by the terms of claim 9, and also by claim 7, and those two particularly flanged, plural spoked, single piece, sheet metal "supporting body" parts in this example *are telescoped* together and operatively arranged between the hub and rim elements of the final completed wheel combination. The actual improvement invention, the real patented property measured and defined by the said claims, however, is not so limited and restricted. The invention is present in each separate one of *said* supports. The novel structural idea disclosed and claimed never had previous existence in the art either in a one or two member assembly.

There was no justification for impliedly misconstruing and restricting and reducing the scope and boundaries of the *actual* improvement invention disclosed and claimed by the terms of either of said claims 6, 7 or 9 in suit *to only* that one assembled example or "best

mode of application" in a final metal wheel organization, precisely like that in the wheel shown in the patent drawing. The defendant infringers, who plainly employ at least one of the *real improvement parts* defined by claim 9 or claim 7 in all their accused wheel constructions, were allowed to escape the charge of infringement *solely because* they employ *only one* of the said *defined* improvement *parts* or *combination* in their final wheel organization, and do not *telescope two* supports. The determinate facts were misapprehended by the District Court; and the Court of Appeals *per curiam* is upon a different erroneous basis of error.

The said Circuit Court of Appeals *per curiam* affirmance of the manifestly erroneous decision of the District Court, entirely disregarded the actual evidence and all of the points of error and questions presented, based upon the actual record in this case, and without evidence, without any supporting authority, without due process, erroneously determined the issues on this appeal before it by arbitrarily and superficially considering only the *opinion* in an unrelated earlier different case of plaintiffs against different defendants, The Studebaker Corporation, *et al.* (113 Fed. (2nd) 400), based upon a decidedly different record. The same facts and the record of the said *Studebaker* case were not before the said Circuit Court of Appeals, or the said District Court, in connection with the trial or appeal of the instant case, and the record of the distinctly different case against the Studebaker Corporation, *et al.* did not constitute any part of the cause of action against the said Chrysler Corporation, *et al.,* then pending for appellate judicial determination on review before the said Circuit Court of Appeals.

The Studebaker record not only does not form any part of the record in the instant *Chrysler* case, but

neither the opinion nor the record nor any facts about the *Studebaker* case was considered or discussed,—in record, briefs, or arguments, before the said Circuit Court of Appeals in the matter of this *Chrysler* case appeal; and the plaintiffs-appellants, your petitioners, never had any opportunity to be heard to demonstrate the errors and unjust results of the litigation against the Studebaker Corporation.

The law does not sanction affirmance of the erroneous District Court decision in the instant *Chrysler* case by merely *adopting,* superficially referring to and reaffirming the erroneous decision made upon a manifestly different record, in an earlier different case against the different Studebaker Corporation, *et al.,* defendants. There is no justification in view of the actual facts of record in this instant *Chrysler* case, and established principles of law applicable to the facts, for the Circuit Court of Appeals to perpetuate and further extend the errors and unjust results of the earlier different case against the Studebaker Corporation. It was the duty of the Circuit Court of Appeals to judicially determine the points and questions presented upon the actual record of the instant case. That was not done. (*Triplatt, et al.* v. *Lowell, et al.,* 297 U. S. 638, at 642, 644, 645; *Federal Trade Commission* v. *Raladam Co.,* 62 Sup. Ct. 966 (decided April 27, 1942).)

A further very unusual situation is presented in the litigation over this patent; and in more than forty years of practice counsel for petitioners have never known of a similar situation in an important case; that *no authority has ever been cited at any time throughout the long litigation,—either by the defendants' counsel, or by either of the two District Judges, or by the Courts of Appeal,—in either the instant Chrysler case, or in the prior case of plaintiffs against the Studebaker Corpora-*

tion, et al. No sound authority could be cited which affords the slightest basis of legitimate support to either of the decisions, or to the so-called "conclusions of law," or the argumentative and erroneous statements called "findings of fact" in either the instant suit against the Chrysler defendants, or the earlier suit against the Studebaker defendants, or to support any of the contentions for the defendants made in either the instant or the earlier case. The several able and diligent counsel for the defendants, and their numerous assistants would have produced some relevant evidence and supporting authorities, if anything of the kind existed.

It is manifest that the actual, determinate facts of record and the points and questions presented by the patent owners for consideration on this appeal have not been properly examined and judicially determined.

A. The basic facts upon which the rights of the parties depend and the proceedings which have been thus far had for the purpose of securing a judicial determination of those rights in this case are, briefly stated, as follows:

(1) Prior to December 9th, 1918, Gerald G. Barry (who had many years of practical manufacturing experience and had expended thousands of dollars in research and experiments toward solution of the problems involved), discovered and invented certain new and useful improvements in metal wheels, and then and there lawfully owned all of the property rights in said improvement invention.

(2) On December 9th, 1918, said Gerald G. Barry, being within the meaning of the applicable statutes of the United States, then in force, the original, first and sole inventor of the said new and useful Improvements in Wheels, disclosed and duly filed in the United States Patent Office an application for letters patent on his

said invention. Thereafter upon due course of examination, action and procedure by and before the United States Patent Office certain claims in the application, as amended and shown in a subsequent "certificate of correction" as to claim 9 were adjudged and allowed by the Patent Office, and thereupon, on the 11th day of July, 1922, all of the requirements of the statutes having been complied with, said letters patent of the United States Number 1,422,167, including the said claims 6, 7 and 9 in issue in this case, were duly granted to the said Gerald G. Barry.

(3) That on or about the 24th day of December, 1930, the said Gerald G. Barry executed an assignment in writing of a one-half interest in and to said letters patent No. 1,422,167 (together with certain other patents not involved in this litigation), to Georgiana G. Barry; the said assignment was thereafter duly recorded in the United States Patent Office; and your said petitioners, it is admitted, are now the owners of said patent No. 1,422,167, and of all rights of action, claims or demands thereunder, for infringement of the said patent.

(4) That on, to wit, the 16th day of November, A. D. 1937, said Gerald G. Barry and Georgiana G. Barry, owners of said patent No. 1,422,167, commenced an action for the infringement of said patent, by the filing of their Bill of Complaint (Pr. Trans. 2-11) in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division (Equity No. 15854), to which Complaint the Chrysler Corporation and its wholly owned subsidiaries, Chrysler Sales Corporation, Chrysler Motor Parts Corporation, Chrysler Illinois Company, and Dodge Brothers Corporation were made parties defendant, and by appropriate allegations in the pleadings were charged with infringement of said claims 6, 7 and 9 of said U. S. patent

No. 1,422,167, by reason of *using and selling* certain accused wheel constructions embodying the improvement inventions which are measured and defined by said claims 6, 7 and 9, respectively, of the said patent. Said original defendants did not manufacture but purchased their wheels from different sources of supply. In due course the said defendants filed their answers to the said plaintiffs' Bill of Complaint (Pr. Trans. 12-17) and the case stood at issue for trial.

(5) Thereafter Budd Wheel Company on October 14, 1940, filed an intervening petition, claiming to be the *manufacturer* of some but not all of the said accused wheel constructions used and sold by said Chrysler defendants; and the said Budd Wheel Company were by the said District Court granted leave to intervene in said suit, and thereupon filed its answer therein (Pr. Trans. 18-24).

(6) The said original Bill of Complaint, the Answers and subsequent pleadings appear, arranged in proper sequence and are indexed, in the certified Printed Transcript of Record (pp. 2 to 24) which is being filed with this petition.

(7) *Report of Trial.* In due course the said cause of action came on for trial before the said U. S. District Court, commencing March 24th, 1941 (Pr. Trans. 25). A complete report of the proceedings had and evidence taken upon said trial, and also of the subsequent proceedings for appeal from the decree of the District Court, is contained in the said Printed Transcript of the Record, being submitted with this petition (pp. 26-281). This Printed Transcript before the said Circuit Court of Appeals includes copies of the patents introduced by the plaintiffs and the defendants. A subject index, pages *i* to *v*, will be found preceding page 1 of the said Printed Transcript.

(8) Said certified transcript of record of the instant case shows that unusually clear and sufficient *proof of the validity and also identity of the infringements by defendants* of said United States Patent No. 1,422,167, was established by plaintiffs' evidence upon the trial. Under the well-settled principles of law applicable to the said fact proofs, the plaintiffs were entitled to a decree against said defendants and the intervenor defendant. *There was no testimony for the defendants and no relevant material evidence whatever to the contrary of the proofs of plaintiffs, or any showing to overcome the settled presumptions in favor of the patent and the legitimate effect of the actual proofs in the record.* The erroneous decision the District Court made in this case is not referable to or sustained by any evidence or proofs in the actual record of the case. The decision of non-infringement rests on the initial fundamental error that the entire principle of the invention should be confined to a replica of the wheel assembly shown in the patent drawing. This misconception of the scope and boundaries of the real invention made and claimed impliedly creates the assumption of a difference upon which the defendants were allowed to escape the charge of infringement on the ground that defendants' accused wheel constructions are not found within the unwarrantably restricted boundaries of the property. The District Court decision is contrary to the evidence and conflicts with the law.

(9) The following is a summary of the due and sufficient proofs of validity and infringement established by the evidence in this record of the trial in said U. S. District Court.

(*a*) Plaintiffs first introduced the patent in suit No. 1,422,167 (Pr. Trans. 26). A copy of this patent is inserted in the Printed Transcript, 27-36. Under the

well established principles of the law,—*and notwithstanding the erroneous statements in the per curiam opinion,*—this patent carried sufficient proof of its validity, even without any of the cumulative opinion testimony of the expert. Each claim measured and defined the boundaries of improvement inventive *property* which was entitled to protection against infringers. As this Court succinctly stated: "The issue of the patent is enough to show, until the contrary appears, that all the conditions under which a discovery is patentable in accordance with the statute have been met. Hence the burden of proving want of novelty is upon him who avers it. * * * 'every reasonable doubt should be resolved against him.'" (*Mumm* v. *Decker & Sons,* 301 U. S. 168, 171; and see, *Radio Corporation* v. *Radio Engineering Laboratories,* 293 U. S. 1.) There is no proof to the contrary in this case.

(*b*) *Additional* proof of validity and explanatory evidence of the real improvement inventive "change" made in such metal wheel structures that was intended and entitled to be measured and "secured" to the patentee by the terms of said claims 6, 7 and 9, as granted by the government after due consideration and adjudication by the Patent Office, is then shown in this record by the plaintiffs' introduction of the Patent Office File History of said patent (Pr. Trans. 37) together with a folder containing copies of the four prior patents cited by the Patent Office as the best and closest examples from the state of the art. Copies of these patents are inserted (Pr. Trans. 39-55); and see page index in front of the Transcript. In view of this Patent Office history and prior patent references expressly before the Patent Office authorities when the claims were allowed, increased force is given to the action of the Primary Examiners and the Chief Examiner in their final allowance and

"adjudication" of *valid* patentability of the *invention* measured by the separate claims. This record presents unusually clear recognition and correct determination by the Patent Office that the *actual* improvement invention the patentee disclosed and particularly pointed out by the said claims 6, 7 and 9, in full compliance with the Patent Act (Sec. 4888 U. S. Rev. Stat.; 35 U. S. C. A., Sec. 33) constituted novel, original, valid patentable subject matter of improvement invention in the very respects in which the inventor changed and made a step in advance in such metal wheel constructions.

Further, by comparing these four patents cited during the course of the proceedings in the Patent Office with the nine patents introduced in this record by the defendants in attempted support of identity with their "plea" of the rule of *stare decisis,* it is made more certain that the Patent Office *adjudication* of the claims was right, and that there is no anticipation of the *same* invention claimed in the Barry patent in suit, or any want of patentable originality of that actual improvement invention measured and defined by the claims granted to Barry shown in a single one of the said nine prior dated but patentably different disclosures.

(*c*) **As to proof of infringement:** The instant record shows, through the few interrogatories to and answers of the defendants thereto (Pr. Trans. 57-59), and identification and introduction of the accused wheel devices of the defendants (Pltf. Exhs. 4, 5 and 6) (Pr. Trans. 59-60), that there was sufficient proof on the infringement issue; and that this proof was also sufficient on identity of the infringement charged without the opinion testimony of the expert which followed, as cumulative evidence. The accused wheel exhibits before the Court were complete (Pltf. Exhs. 4, 5 and 6), embodying the respective inventive combinations and improvement

parts claimed, just as adapted and applied and used on automobiles. The wheels could be and were handled before the Court, and the claimed inventions are open to full examination.

It may be mentioned at this point, that *one of these wheels* (Pltfs. Ex. 6), (which the evidence definitely shows embodies and contains clear infringement of the combination claim 6, as well as infringement of the claim 9 and claim 7) *was not involved in the previous Studebaker litigation.*

Comparison, which the Court itself could readily make in this case, between the patent in suit and the accused wheel devices, demonstrates identity, constituting infringement of the inventions which are measured and defined by the respective claims 6, 7 and 9. There is literal response to said claims,—in terms, function, construction, operation and new and useful results produced by the employment of the said patented inventive property. In fact, there is no dispute, or room for any argument, about the infringement, *if and provided* the actual improvement invention made and measured by the said claims 6, 7 and 9, is not impliedly misinterpreted and unwarrantedly construed as confined to only that "one best" mode of applying the real improvement invention, in the double form and telescoped arrangement, selected to be described and shown in the patent drawing.

(*d*) **The cumulative testimony of the expert,** which was given *after* the foregoing *prima facie* and quite sufficient proof of validity and also identity of the infringement, was not absolutely essential to sustain the plaintiffs' "attempt now to re-litigate the issue of validity," as the *per curiam* opinion of the Circuit Court of Appeals mistakenly infers. The expert's testimony, however, was of aid to the District Court. This testimony was cumulative only. It was not contradicted or disputed in any

way, even in the arguments. The expert was an unusually capable and experienced engineer, and among other qualifications (Pr. Trans. 60-61) he had been an Assistant Examiner in the Patent Office. The expert's testimony was in two parts,—*first,* for plaintiffs giving increased force to the proofs of validity and infringement, and, *second,* later in rebuttal of the defendants' dubious contentions, the plea of *stare decisis,* the nine prior dated patents, and the erroneous statements in the *Studebaker* case opinion.

(*e*) With the additional introduction of photostatic enlargements of the patent drawing, and also several large size detail drawings made of the accused wheel devices (the infringing wheel exhibits being already in evidence), the expert then further aided the court with his testimony as to the novelty, utility and patentable originality of *actual improvement invention* made by the patentee as measured and defined by each of the separate claims 6, 7 and 9 in suit; then pointing out some of the advantages and utility of the novel changes and of the new and useful results produced by means of the real invention upon which the government had granted the claims 6, 7 and 9.

(*f*) The expert followed with *further* clear proof of the *infringement* of the said claims which he showed was embodied in the defendants' accused wheels (Pltfs. Exhs. 4, 5 and 6). He took each of the defendants' accused wheel constructions in evidence, together with the large detailed drawings of said wheels devices which had been made by him or under his supervision; and reading the respective claims and the elements thereof, the expert traced and identified the infringing presence of the actual separate inventions defined by the terms of said claims 6, 7 and 9, respectively, which he found were embodied and contained in the said accused wheels

of the defendants. Literal infringement response to the said claims in suit was found and pointed out, in terms, function, construction, operation and in new and useful results produced.

(10) **The attempted defense in this case was a complete failure and without any supporting basis in facts or law.** The sole defense asserted and finally relied upon by defendants in the trial in the District Court and also upon the appeal, was the mere *"pleading"* (without any relevant supporting evidence) of the "applicability of the rule of *stare decisis"* by reason of the same claims which are in suit having been held invalid, but upon a materially different record of facts in evidence, in a different suit of the plaintiffs against entirely different defendants, the Studebaker Corporation, *et al.* (113 Fed. (2nd) 400, (C. C. A. 7).

This alleged "defense of *stare decisis"* was first presented in the pre-trial conference order prepared by defendants' counsel (Pr. Trans. 25). Chief counsel for the defense (who entered this case after the Studebaker decision) well knew there never was any meritorious fact basis of defense in the instant case, and also knew that the Studebaker decision was wrong, in facts and law, and was the result of the courts having been misled by a mass of incompetent and legally insufficient "evidence" presented by the defendants in the *Studebaker* case, which alleged "evidence" was certain to be objected to, and would not be admissible, if its presentation was attempted to be repeated in the instant *Chrysler* case. In this later case against Chrysler Corp., *et al.,* therefore, the defendants' counsel desperately relied entirely on the unusual and legally insufficient *pleading* of the rule of *stare decisis,* without any fact basis, without any testimony or evidence, or citation of supporting authority, and without even attempting to repeat the same

veritable "brainstorm" of incompetent testimony about the "philosophy of wheels," with the numerous alleged models, elaborate colored drawings, modifying the prior patents cited by defense, attempting a sort of a *nunc pro tunc* creation of doubt about invalidating anticipation of the invention, obscuring the truth as to physical facts or parts, for example, by using two allegedly different shades of green ink in coloring the drawings and green paint on the models. None of that alleged evidence "is in this record. In the instant *Chrysler* case, the defendants introduced no testimony or any relevant evidence whatever to support any alleged defense. The defendants relied entirely on the *plea* of "applicability of the rule of *stare decisis,*" without any supporting evidence or citation of authority.

Defendants' counsel apparently recognized that the presentation by them of this "defense" in the pre-trial conference order was insufficient to support a motion for a "declaratory judgment" which they stated they intended to ask in the pre-trial conference (Suppl. Rec. 12), which the District Judge rightly indicated he would not enter; so further, more elaborate efforts were made by the defendants to confuse and mislead the courts in the judicial determination of the issues upon the trial of this case.

On the day of the trial of the instant case the defendants were allowed to file some "amendments to answers" having certain alleged "exhibits" attached to the "pleading," which the defendants' counsel vaguely contended should be accepted as a substitute and dispense with any need for supporting testimony or evidence, and would prevent plaintiffs from objecting, or cross-examining their witnesses to demonstrate the incompetency of that alleged "evidence," and other errors of the earlier *Studebaker* case. The main "exhibit" was a certified copy of

the opinion of the Court of Appeals in the earlier *Studebaker* case (113 Fed. (2nd) 400). There are statements in that opinion which are manifestly erroneous in basic facts and law applied to the facts, but the defendants seemed to think these statements were nevertheless conclusive against plaintiffs, without repetition of the fictitious "evidence" on the part of defendants, and without giving plaintiffs any opportunity to cross-examine, or to produce other evidence to develop the real truth and demonstrate the false basis of the "defense," and errors in the Studebaker opinion in other respects.

While the different Studebaker record and alleged "evidence" of the defendants therein forms no part of the record in the instant case against the Chrysler defendants, and there was no occasion or opportunity to consider or discuss it in any way before the Circuit Court of Appeals in the course of the appeal procedings in this case, yet in view of the quite unusual *per curiam* opinion herein we are justified in explaining that *in the case against the Studebaker Corporation, et al., the District Court gave no opinion, oral or written, at any time, but merely signed some rather amazingly irrelevant argumentative and erroneous statements, called "findings of fact" and "conclusions of law," drafted by counsel for the defendants, and ordered the entry of the decree about six months after the trial.* These "findings" and "conclusions" were not sustained by, but were contrary to, the evidence of record in the *Studebaker* case, and were not supported by any citation of authorities; they were in conflict with applicable decisions of the Supreme Court. Nothing like those "findings" and "conclusions" can be found in the books; and, notwithstanding the mistaken statements in the opinion in the *Studebaker* case, we respectfully insist that neither the true facts, nor the so-called "findings" constituted that character

of "proof beyond a reasonable doubt" which the law demands to overcome and negative the presumptions in favor of the claims of the Barry patent as granted.

Two sets of "amended pleadings" as to the "applicability of the rule of *stare decisis*" for the original defendants (Suppl. Rec. 14) and the intervenor defendant (Suppl. Rec. 17) in the instant *Chrysler* case were filed, which counsel for defendant vaguely contended constituted some sort of a *plea in estoppel* and should be accepted (without evidence or supporting authority) as *conclusive in bar of the instant suit* of the plaintiffs against the different Chrysler defendants, and the instant case being based on a vitally different record. The defendants' said "pleas" conclude with the following recital:

> "Defendants therefore aver that the rule of *stare decisis* is applicable with respect to the invalidity of claims 5, 6, 7 and 9 of the Barry patent in suit, these being the claims and the only claims specified in the complaint herein and the only claims within the issues that were settled upon at a pre-trial conference herein, as set out in Court order herein October 31, 1940, specifying the issue 'applicability of rule of *stare decisis.*'"

Petitioners' counsel objected to the presentation of the plea at the time but the honorable District Judge was not disposed to listen to any argument about allowing the defendants to file their alleged pleading, and ordered the trial to proceed with the presentation of evidence. Later, after the plaintiffs had established their very clear proofs of validity and infringement, plaintiffs made oral demurrer and motion to strike the defendants' said "amendments to pleadings." (Pr. Trans. 107, 108, 110.) And this record on appeal includes Points of Error directed to this situation.

Defendants did not and could not support their "plea" or any defense contention by any competent and meritorious evidence in this record; nothing of the kind ever existed, or the able, diligent counsel for the defendants and their numerous assistants would have produced it for this record.

(11) On the trial of the instant *Chrysler* case the record shows that the defendants merely introduced the nine prior dated patents (Pr. Trans. 108-110), which were mentioned in the opinion of the Court of Appeals in the case against Studebaker Corporation. *There was no testimony for the defendants in this case with regard to a single one of the said nine patents, or otherwise in attempted support of defendants' "plea,"* or any matter of alleged defense. That great mass of incompetent testimony and alleged "evidence" which was allowed to be introduced by the defendants in the *Studebaker* case was not even attempted to be repeated in the instant *Chrysler* case, although it may be stated the principal expert of the *Studebaker* case was present in court with counsel throughout the trial of the instant *Chrysler* case.

Any proper examination of the said prior dated patents demonstrates that not a single one of them shows any *anticipation* of the *same* new and useful improvement *invention* disclosed and *measured by either of the claims 6, 7 or 9 of the patent in suit; nor disclose any matter of defense;* and *the District Court in either its opinion or findings or conclusions did not say a word to indicate there was any anticipation or any other meritorious matter of defense.* The District Court's decision of non-infringement rests on its own misconception and misconstruction, by implied interpolations into the said claims of some unexplained limitations which are given the effect of *confining the entire principle* of the improvement invention to that "one best" example or *double*

form of the novel supporting body elements between the hub and rim of the wheel which is shown in the patent drawing.

There was no testimony or evidence whatever to overcome the well-settled presumptions of the law in favor of validity of the invention as it is measured and defined by the language and terms of the said respective claims 6, 7 and 9, or the legal effect of actual proofs of plaintiffs in this record, either as to novelty, utility and patentable subject matter of "invention," or as to the defendants' infringement which proofs amply sustained the issue of validity and also infringement by the defendants of said claims 6, 7 and 9 of said patent in suit, No. 1,422,167.

(12) **Plaintiffs' evidence in rebuttal:** While the defendants did not, and could not, offer any competent material evidence in support of their "defense," the plaintiffs' expert witness, however, did give clear testimony in rebuttal as to the effect of the introduction of the nine prior dated patents in the record for the defendants, and as to other points suggested in the vague argumentative contentions of defendants' counsel and by their pleading of the "applicability of the rule of *stare decisis.*" Plaintiffs' expert demonstrated in his rebuttal testimony, shown in the record of this case (Pr. Trans. 174-192), that there was *actual* novel and patentably original *difference* between the patent in suit and the said prior dated patents, and not any matter of anticipation of the *same* invention, which had been adequately disclosed in full compliance with the Patent Act and measured by the respective claims 6, 7 and 9 of the patent in suit. In this connection, it is to be remembered also, that there is a well established *legal presumption of patentable difference and non-anticipation* between the inventions *as claimed* and granted by the patent in suit with those measured and defined by the claims of the

prior dated patents. (*Kokomo Fence Co.* v. *Kitzelman*, 189 U. S. 8, 23; *Miller* v. *Eagle Mfg. Co.*, 151 U. S. 186, 208; *Consolidated Safety Valve Co.* v. *Crosby S. G. Co.*, 113 U. S. 157, 171.) Proper examination manifests patentable differences and not any character of anticipating identity of the respective inventions claimed.

The expert demonstrated there was no meritorious basis in fact for any of the nebulous contentions asserted for the defendants. Plaintiffs' case was strengthened by the rebuttal testimony. That testimony by plaintiffs' expert witness was not weakened or disturbed in the slightest respect, but the basic facts were emphasized on his cross-examination by the defendants' counsel (Pr. Trans. 192-202). After consultation between the several counsel for the defendants and one of their principal experts, who had testified in the former *Studebaker* case but was not put on the stand in the instant *Chrysler* case, although all said persons were present in court throughout this trial and also during the former Studebaker trial,—defendants' counsel decided not to attempt to offer any testimony or evidence in rebuttal (Pr. Trans. 203). *There was no evidence which could have been offered in legitimate support of the "defense";* and after having "combed the world" in extended search for something, the very diligent able counsel and assistants were well aware of that fact. *The defense was a complete failure.*

(13) **Plaintiffs' right to decree against the defendants was fully and clearly established by the evidence.** Judicial consideration of the actual record in this case demonstrates that validity and infringement by the defendants of the actual improvement invention in metal wheels which is measured and the boundaries of the property defined by claims 6, 7 and 9 of the patent in suit, No. 1,422,167, was very clearly established by plain-

tiffs' proofs, in compliance with the Patent Act (Sec. 4888 of U. S. Rev. Stat., 35 U. S. C. A. Sec. 33) and the well-settled principles of the law found in decisions of this Honorable Court applicable to such facts, such as *Radio Corporation, et al.* v. *Radio Engineering Laboratories,* 295 U. S. 1; *Diamond Rubber Co.* v. *Consolidated Rubber Tire Co.,* 220 U. S. 428; *Sanitary Refrigerator Co.* v. *Winters,* 280 U. S. 30, 41-42; *Seymour* v. *Osborne,* 78 U. S. (11 Wall.) 516, 548; *Winans* v. *Denmead,* 14 How. 330, 342. There was no evidence whatever in this record to overcome the presumptions of validity of the invention measured by the respective claims or the effect of the facts determinative of the patented property rights established by plaintiffs' proofs in this record.

(14) **As to the plaintiffs' draft of "findings of fact" and "conclusions of law."** Among the points of error assigned in the record of this case, and the facts disregarded by the Circuit Court of Appeals in its *per curiam* decision, are those relating to the very appropriate "findings of fact" and "conclusions of law" (based upon the *actual* evidence in the record of this instant *Chrysler* case), which the plaintiffs submitted and requested the District Court to make and state in this case, pursuant to Federal Rules of Civil Procedure, rule 52(a) and 52(b), following the applicable statute U. S. C. A. Title 28, Secs. 723, 773 and Sec. 875, which require the District Court in all civil actions tried upon the facts without a jury to make and state upon the record.

(*a*) This record shows that in connection with the plaintiffs' brief, in advance of arguments, there was, on April 15th, 1941 (Pr. Trans. 203), submitted to the District Court by plaintiffs' counsel a draft of "findings of fact" and "conclusions of law" (based upon the *actual* material facts of record in this case), which the plaintiffs requested the District Court to make and enter

upon the record. This draft of findings and conclusions, based on the actual facts in evidence, which the plaintiffs proposed, appears in the Printed Transcript, pages 205-236. Two carbon copies of these papers and of the subsequent motion papers with reference thereto were furnished to counsel for defendants (Pr. Trans. 204). No question or criticism of the correctness of the statements in plaintiffs' said proposed draft was ever made by either counsel for the defendants or by the District Judge. Not having been acted upon by the District Court, the plaintiffs, on May 13th, 1941, filed a formal motion requesting the Court to make findings, etc., and suggestions in support of the motion (Pr. Trans. 236-238), and the same draft was returned to the Court with the motion papers. This motion was not acted upon by the District Court, and the decree was ordered entered May 20, 1941. Thereupon, on May 28th, 1941, plaintiffs filed a motion to vacate the decree, to amend and correct the record, and to make and enter certain supplemental and additional findings of fact and conclusions of law, and for other corrections and rulings, all under the six sections of the motion papers (Pr. Trans. 245-249), and requesting the Court to thereupon enter a decree appropriate to the premises of the record as amended and corrected. This last motion was arbitrarily denied, without permitting discussion or argument (Pr. Trans. p. 249).

In the Statement of the Points of Error, Nos. 21, 22, 23 and 24 (Pr. Trans. pp. 265-266) are directed to this erroneous situation of the action of the District Court in the premises. That this showing of the facts and of the error of the District Court in said premises is material and properly made a part of the actual record in this case, and that the substance of the actual facts of record set forth in plaintiffs' draft of "findings" and "conclusions" appearing in the Printed Transcript of

Record, with Points of Error addressed thereto, should not have been disregarded by the Circuit Court of Appeals, as they were by the *per curiam* decision, is demonstrated by reference to the statute, to Federal Rules of Civil Procedure, rule 52(a) and 52(b), and to applicable decisions of this Court, such as *Eastman Kodak Co.* v. *Gray,* 292 U. S. 332.

(15) **The District Court decision,** as already mentioned rests solely on the misconception of the *principle* of the actual improvement invention and misconstruction of the scope and boundary of the patented property which, in effect, confines all the claims (those in suit as well as other *contrasting* claims of the patent which are not in issue in this case) to that "one best" example, or *double* form of application of the dominating improvement *part,* in the final assembled wheel described and illustrated in the patent *drawing.* This misconstruction leaves covered and embraced within the boundaries of the patented property *a great deal less than the whole* of the *actual* improvement inventions which are measured by the language and terms of the said claims 6, 7 and 9, respectively, and the District Court's mistaken assumptions *excludes from* protection of the patent the important broadest *parts* and less limited *combination* features disclosed by the patentee, defined by the terms of said claims, respectively, which the Patent Office adjudicated, and which both the inventor and the government intended by their grant to "secure" said improvement inventive property rights.

The District Court in deciding non-infringement and allowing the defendants to escape the charge, rested the decision solely because the defendants' accused wheel constructions do not employ *two* of the same dominating novel plural spoked, single piece, particularly flanged, sheet metal supporting body parts, and have the two

substantially identical and complete separately made support articles *telescoped* together, in the final assembled wheel combination of essential elements, precisely like that "one best mode" of applying the broad invention of claim 9, or of claim 7,—the *double* form of substantially identical support articles, illustrated in the patent drawing. It is not, and cannot be disputed, that each one of the defendants' wheels (Pltfs. Exhs. 4, 5 and 6), have *at least one* of the novel support parts, which responds to claim 9 and claim 7, embodied in their wheel constructions. Under the well settled rules of patent construction, there can be no doubt that the claims are valid and that the accused devices constitute infringements of said claims 7 and 9.

The actual improvement invention measured by claim 9, as read with the "certificate of correction" (the broadest claim in the patent), and also by claim 7, is present and infringed irrespective of whether *one only* or two of the *same* novel "support" elements are employed together in the final assembled wheel organization, and irrespective of any telescoping. Said claims 7 and 9 do not *demand,* and do not prohibit, the use of *more than one.* Combination claim 6 does not *demand* that the two plural spoked single piece supports called for by the language of claim 6 shall both have the same complete flange feature, it is sufficient if there is embodied in the wheel one said support having the particularly novel improved flange. And *neither one* of said claims 6, 7 or 9 *calls for any telescoping.*

This Court, and also the said Circuit Court of Appeals for the Seventh Circuit, have repeatedly held that claims measuring patented property are not to be limited and construed as confined to that "one best mode" of application of the improvement described and shown in the patent drawing. There is no question or dispute or room

for any argument (and there was none by defendants) that the claims are infringed if and when they are properly construed. Among the cases which have stated this settled principle of the law of construction of patented property claimed are the following: *Smith* v. *Snow,* 294 U. S. 1, 11; *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.,* 210 U. S. 405, 418; *Nordberg Mfg. Co.* v. *Woolery Mfg. Co.,* 79 Fed. (2nd) 685, 692 (C. C. A. 7).

(16) **Proceedings in the Circuit Court of Appeals.** Petitioners duly prosecuted an appeal to the United States Circuit Court of Appeals in and for the Seventh Circuit from the decree of said United States District Court for the Northern District of Illinois. The certified printed transcript of record which is being filed with this petition includes due notice of appeal, the Statement of the Points of Error on which plaintiffs-appellants relied, and all the other steps and proceedings referable to the actual record in connection with the appeal in this case, with a full index in the front of the Printed Transcript.

(17) On the appeal in this case plaintiffs-appellants demonstrated in brief and argument with appropriate references to the record and citation of authorities, that the decree of dismissal by the said District Court was erroneous and should be reversed; that there is not only the well settled legal presumption of validity of the patent in all respects,—novelty, utility and patentable invention, of the said improvement, measured by the claims granted, to the benefit of which presumptions of the law the patent owners, plaintiffs, are entitled, but that the actual evidence in this record definitely established *clear and undisputed* proof of novelty, utility and patentable originality, and also infringement, of the *principle* of the improvement invention which, in full compliance with the Patent Act (Sec. 4888, U. S. Rev.

Stat.; 35 U. S. C. A. Sec. 33) the patentee disclosed and explained to distinguish from other inventions, and did "particularly point out and distinctly claim the part, improvement or combination which he claims as his invention or discovery."

Validity and also infringement by the original defendants and the intervenor defendant of the said actual improvement invention disclosed and the boundaries of which patented property was measured and defined by claims 6, 7 and 9, respectively, of said U. S. Patent No. 1,422,167, was shown to have been definitely established by the proofs in this record. While, under the well settled principles of law, certainty and not merely conjectural but clear and cogent evidence,—generally expressed as constituting "proof beyond a reasonable doubt"—of legally sufficient facts to the contrary is required to overcome the force of the presumptions of validity which attach and follow from the adjudication by the Patent Office and grant of the claims by the government (*Radio Corporation, et al.* v. *Radio Engineering Lab.*, 293 U. S. 1; *Mumm* v. *Decker & Sons*, 301 U. S. 168, 171) *there was no relevant evidence whatever in the record of this case of any contrary fact of invalidity,* or of any *fact, or principle of law,* to qualify, or limit and reduce or narrow the scope and boundary of the patented property rights measured by said claims 6, 7 and 9, respectively, and which, when rightly so measured and defined, *it is not and cannot be disputed is embodied in the metal wheel constructions of the defendants* in evidence, accused as and *constituting infringements* in this case. (Pltfs. Exhs. 4, 5, and 6.)

(18) It was demonstrated by the plaintiffs-appellants that the District Court had misconceived the *real invention* which is defined by said claims in suit and had misconstrued the legal effect of the fundamental basic facts

established by the proofs in this record; and that showing of the plaintiffs-appellants was disregarded by the defendants and by the Court of Appeals *per curiam* decision. Both the District Court and the Circuit Court of Appeals overlooked or disregarded the well established doctrine of patent law that each claim of a patent is to be construed independently, to preserve the distinctions wrought into each separate claim by the contrasts and variations from the terms and limitations of other claims in the patent. This Court has repeatedly pointed out that it is the claim,—and not the specifications or the drawings,—which measure the actual invention which both parties to the patent contract intend to define the scope and boundaries of the patented *inventive property* that is to be secured and protected against infringement by the grant of said claims. (*Smith* v. *Snow,* 294 U. S. 1, 11; *Altoona Publix Theatres Co.* v. *Tri-Ergon Corp.,* 294 U. S. 477, 487.) The inventor is not confined to the particular mode of use shown in the patent; as the District Court mistakenly decided in this case, and "it is not necessary to embrace in the claims or describe in the specification all possible forms in which the claimed principle may be reduced to practice." (*Smith* v. *Snow, supra.*)

The District Court entirely disregarded and gave no effect to the fact that the inventions of claim 9, and also that of claim 7 (*in contrast* with other claims which are not in issue in this case), are recited in the singular and not in the plural term. Claims 7 and 9 do not *demand,* and also do not prohibit, the presence of *more than one* of the defined novel "support" members in the final assembled wheel organization. The defendants' infringing wheel (Pltfs. Exh. 4) has only a single "support" member, but it embodies the invention which is measured and defined by the valid terms of claim 9, and also claim 7.

The Court also disregards the fact that claim 6, while calling for two harmonizing plural spoke outline of support members in that particular combination, *does not* include any *demand* that *both* said plural spoked single piece sheet metal support articles shall be provided with the particular novel flange feature, or be arranged in any telescoped relation. Claim 6 is infringed by wheels like Exhibit 6, which were not in the *Studebaker* case. To constitute the valid inventive combination measured by claim 6, and also of infringement thereof, it is sufficient that *one* of the said two supports be flanged as called for by said claim 6, and nothing is said about telescoping.

Claim 9 as read with the Patent Office "certificate of correction" is manifestly the broadest, least limited claim in the patent; and claim 7 is only a little more specific. All three of the defendants' accused wheel constructions (Pltfs. Exhs. 4, 5 and 6), embody and contain the inventions and infringe claims 7 and 9.

(19) It is true that the *patent drawing* does show *two* separate but *substantially identical* and complete novel supporting body elements (differing only slightly in size), operatively positioned between the hub and rim elements of the final wheel organization, and the two said supports which must be made separately, are shown arranged in telescoped relation with each other within the one rim element of the completed wheel, but that is only the "one best mode of application" of the improvement inventions defined by the claims 7 and 9 in suit. In view of the actual improvement inventive facts disclosed, or the language of the claims, or the state of the prior art, and the well settled rules of patent law, there is no legitimate reason why the entire *principle* of the improvement inventions, which are measured by either of said claims 6, 7 or 9, should be impliedly construed as

limited and confined to application only in a wheel which is a mere replica of the patent drawing.

Manifestly *two* "support" members operatively associated and each performing the same full function between the rim and hub elements will make a *stronger* final wheel assembly *than where only one* said support member is employed; and it is also manifest that a still further increase in strength or strain resisting capacity will be produced by employing in the wheel organization two of the *same* novel particularly flanged plural spoked single piece sheet metal supporting body articles, differing only slightly in size at the outer flanges, and arranging the two substantially identical *novel* "supports" in *telescoped* relation when in the final wheel assembly. Hence, the "one best mode of applying the principles" of the claimed improvement invention selected by the patentee to be disclosed, illustrated in the patent drawing, and explained in the patent and measured by appropriate variations in the terms of the different claims granted by the government, after adjudication by the Patent Office.

The statute is plain, and that the *"part, improvement or combination"* which in full compliance with the statute was measured by either of said claims 6, 7 or 9 constituted *valid* subject matter of *patentable invention* and was entitled to protection under Federal law, *whether only one or more than one of the same improvement supporting devices are employed* between the hub and rim of the final wheel organization, is demonstrated by reference to the language of the statute (Sec. 4888, U. S. Rev. Stat.; 35 U. S. C. A. Sec. 33) and to such cases as *Deering* v. *Winona Harvester Works,* 155 U. S. 286, 302, 39 L. Ed. 153, 159; *Jones* v. *General Fireproofing Co.,* 254 Fed. 97, 99-100 (C. C. A. 6); and *National Malleable Castings Co.* v. *American Steel Foundries Co.,* 182 Fed. 626, 639.

The District Court decision and the Circuit Court of Appeal's per curiam affirmance thereof are both manifestly erroneous and should be reversed by this Honorable Court.

(20) **Complete failure of defense.** Defendants-appellees on the appeal proceeding before the Circuit Court of Appeals did not meet, and could not meet, the presentation of the Points of Error in this case with any showing, either of facts or law, to support any contention on behalf of the defendants. *The defense was a complete failure in both courts.* There is no basis in the evidence of record for the *per curiam* decision.

The Brief and Argument for defendants in the Circuit Court of Appeals was *remarkable for its failure to discuss or deal with the actual facts of record in this case, or to answer or discuss any of the Points and questions presented for consideration and judicial determination upon the actual record in this case,* or presented in the brief and argument of the plaintiffs-appellants. *Nothing* was said by defendants-appellees upon the subjects of the actual *novelty, utility* and *valid patentably* original character of the *inventive improvement* "change" in metal wheel constructions, or as to the effect of the Patent Office adjudication of the claims, nor as to the presumptions of law and fact which attach and follow from the grant by the government of the statutory monopoly or patented property rights measured by the said claims 6, 7 and 9 of the patent in suit, nor as to the clearly established and really undisputed infringement of said claims by the defendants, embodied and employed in the defendants' accused wheel constructions. (Pltfs. Exhs. 4, 5 and 6.) All such questions were dealt with in the Brief and Argument of Plaintiffs-Appellants, with appropriate references to the fact basis in the record, and with citation and quotations from ample supporting

authorities, all demonstrating that the District Court decision was erroneous and should be reversed. Defendants relied entirely on their *plea of stare decisis*, without evidence or supporting authority.

(21) **The rule of stare decisis has no legitimate determinate effect in this case.** On the appeal, as well as in the District Court, in the instant *Chrysler* case the defendants-appellees, having no defense on the merits, relied solely and entirely on their unfounded, unsupported and unsupportable argument about the effect as *some sort of estoppel in bar* which, defendants vaguely contended, should be attributed to their "amended pleading," filed the day of the trial, of the "applicability of the rule of *stare decisis*" by reason of the *opinion* in the different *Studebaker* case. Plaintiffs-appellants in their Brief and Argument fully demonstrated that the rule of *stare decisis,* and the erroneous decision in the earlier *Studebaker* case *is not in any way* "applicable" to the facts established by the proofs in the record of this case, and has no legitimate effect in the judicial determination of any point or question of the patented property rights involved on the appeal in this case.

Stare decisis is the advisory but not imperatively controlling proposition of following as a precedent former decisions upon *principles of law* which have been established by a *series* of decisions. That rule does not relate to *facts,* and is different from the doctrine of *res adjudicata. Stare decisis* and *comity* are not controlling rules of law, but largely matters of convenience and expediency in practice. The *Studebaker* case is one and not a series, and, moreover, *there are no principles of law announced or discussed in the Studebaker opinion* (113 Fed. (2nd) 400). That earlier and erroneous decision does not operate in any way as an estoppel against the plaintiffs to prevent or relieve the said Court from per-

forming its duty of making a correct and just decision upon the actual record in this later *Chrysler* case.

This Honorable Court has repeatedly recognized the *duty* of courts *to correct and not perpetuate and further extend the effect of errors and unjust results of earlier decisions.* "It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word to decide them right" upon the actual record before the court in the instant case. (*Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485, 489); and this despite a contrary decision of invalidity of the patent in an earlier case against different defendants or upon a different record. (*Triplatt, et al.* v. *Lowell, et al.*, 297 U. S. 638; *Federal Trade Commission* v. *Raladam Company*, 62 Sup. Ct. Rep. 966.)

(22) **Its appellate jurisdiction, powers and duties were not exercised and performed by the Circuit Court of Appeals in the per curiam disposition of the appeal in this case.**

(*a*) The *per curiam* decision of the said Circuit Court of Appeals did not consider, discuss or decide a single one of the Points of error or questions presented upon the actual record of the instant case. The *per curiam* opinion does not contain a single reference to the Points or basis facts, or to any statement or expression of the District Court, or as to any contention of the litigants referable to the actual record in this case against the Chrysler defendants. The Court of Appeals in this case departed from the accepted and controlling course of appellate judicial proceedings and, without due process, without evidence, or any supporting authority, but disregarding the actual facts of record and Points in this case on appeal, affirmed the erroneous decision of the District Court and decided the patented property rights of the petitioners and the issues on appeal in a way

which is not sustained by, but is contrary to, the actual evidence in this case and is in conflict with authoritative applicable decisions of this Honorable Court. The *per curiam* opinion is included in the certified record which is being submitted with this petition for writ of certiorari, and for more convenient reference we are annexing a copy of said *per curiam* decision as an appendix at the end of this petition.

(*b*) The District Court in this case did not, either in its opinion (Pr. Trans. 238-242), or in the findings (Pr. Trans. 242-244) give any approval to the defendants' contentions or to the pleading of "applicability of the rule of *stare decisis.*" The District Court did not adopt or enter any of the vague, argumentative, unfounded and erroneous "findings" which defendants submitted (Suppl. Rec. 19-21) relating to the Studebaker opinion and the alleged effect upon this case of their "plea" as to the "defense" of *stare decisis.* The defendants took no appeal, or cross-appeal in this case; and, of course, their counsel knew there never was any merit to the defense assertions, or any foundation for taking an appeal. What the District Court did say about *stare decisis* was right. (Pr. Trans. 107, 108, 110.)

(*c*) The *per curiam* decision of the Circuit Court of Appeals however, in effect, accepts and erroneously approves, without any discussion, the sole "defense" in this case, the mere "plea" of the applicability of the rule of *stare decisis* (by reason of the opinion the same Court of Appeals rendered in the earlier different *Studebaker* case) as a conclusive *estoppel in bar* of plaintiffs' suit against the different Chrysler defendants, which is moreover predicated upon a decidedly different record. The *per curiam* decision of affirmance is manifestly erroneous and should be corrected. The decree of the District Court should be reversed, and a decree for plaintiffs directed to be entered, as prayed by petitioners.

(23) The *per curiam* opinion affirms the erroneous decision of the District Court in this case, not upon the actual facts, or any principle of law applicable to the real facts of record in the instant case against the Chrysler defendants, but based entirely upon the *adoption* of the erroneous *opinion* of the same Court of Appeals in the earlier *different* case against the Studebaker Corporation, *et al.* (113 Fed. (2nd) 400). The Studebaker opinion was based on a *decidedly different record,* including a mass of incompetent and irrelevant testimony and alleged "evidence" that was not before the said Court of Appeals in any way in connection with its appellate judicial determination of the issues on the appeal in the case against the Chrysler defendants; it formed no part of the cause of action in the District Court, or of the actual record before said Court of Appeals in the instant *Chrysler* case; and was not considered, or applicable law discussed before the said Court of Appeals in this case, either in the record, briefs or arguments. The superficial reference to the names of patentees and serial numbers of prior dated patents mentioned in the *per curiam* opinion did not bring before the said Court of Appeals for any appellate judicial redetermination the facts and errors and unjust results of the litigation against the Studebaker Corporation, *et al.* We were litigating and determining the property rights in issue in the later *Chrysler* case, and were not attempting to relitigate the *Studebaker* case. The true facts as to the "defense" and the nine prior dated patents are disregarded. (Pr. Trans. 212-235.) There was no discussion about any of the said prior dated patents before the Court of Appeals in any way, by the defendants or the Court, upon this appeal.

(24) The *per curiam* opinion of the Circuit Court of Appeals makes no reference to any of the actual determinate *facts* in evidence; nor any reference to the *Points*

(Pr. Trans. 252-267) and questions presented by plaintiffs-appellants which were discussed with the citation of ample supporting authorities in the course of the plaintiffs-appellants' Brief and Arguments. The Court of Appeals, and the defendants, however, disregarded the facts of record and the statements in the draft of "findings of fact" and the "conclusions of law" (Pr. Trans. 205-236) submitted to the District Court by plaintiffs (Pr. Trans. 203) with two carbon copies to the defendants' counsel (Pr. Trans. 204). The plaintiffs' draft is based on the actual and undisputed evidence of the facts in this record.

It was the duty of the District Court to appropriately make and enter the substance of said draft in the record of this case, pursuant to the old statute and the Federal Rules of Civil Procedure, rule 52(a) and 52(b). While the District Judge did not sign these findings, he made none to the contrary. Their correctness cannot be disputed by respondents. That these "findings" and "conclusions" (Pr. Trans. 205-236) are properly a material part of the record of this case, in view of the history of the presentation thereof by plaintiffs-appellants, is demonstrated by reference to the statute, to Rule 52 and to decisions of this Honorable Court, such as *Eastman Kodak Co.* v. *Gray,* 292 U. S. 332. The *actual* relevant material *determinate facts of record* in this case should not have been disregarded as they were, by either the District Court or the said Circuit Court of Appeals.

(25) **The correctness of the statements of plaintiffs' draft of "findings" has not been and cannot be disputed by the Courts or defendants' counsel.** The District Court's decision was for non-infringement and solely based on the mistaken assumption of a patentable difference as the result of its initial misconception and misconstruction of the boundaries of the inventive prop-

erty *claimed* which misconstruction impliedly confined the patented property (despite the language and terms of claims 9, 7 and 6) to a replica of the wheel assembly shown in the *patent drawing,* which does have *two* substantially identical and complete, separately made, "supporting body" parts, which are defined by the terms of claim 9 and claim 7, and the two are *telescoped* together. The *real* invention of claim 9 and claim 7, however, is found embodied and complete *in each one of the two* supports shown, and there is no call in the claims in suit for any telescoping. Other contrasting claims in the patent do demand the presence of two said novel supports and also telescoping. The fundamental error of the District Court decision of non-infringement was fully demonstrated by the plaintiffs-appellants on the appeal. Nevertheless the *per curiam* decision of the Circuit Court of Appeals disregards the actual determinate facts of record and the grounds of the District Court decision, and the *per curiam* judgment of affirmance is rested on *different erroneous grounds of invalidity for want of novelty.*

It is manifest the per curiam is erroneous. It disregards the actual determinate facts of record, and denies to the plaintiffs, the patent owners, all benefit from the proofs, and any and all benefits from the well established rule of the presumptions of validity of the invention measured by the claims which attach and follow from the grant of the claims by the government after adjudication by the Patent Office. Also denied to the patent owners is any benefit from the further rule of presumption of patentable differences and non-anticipation and non-nullifying matter in prior dated patents of the *same* invention covered by the claims in suit. It is well settled that to overcome the legal effect of the presumptions in favor of the claims of the patent as granted much more is required than a preponderance of evidence, there must

be clear and certain proofs of contrary facts; as it is generally expressed, there must be "proof beyond a reasonable doubt." (*Radio Corporation, et al.* v. *Radio Engineering Laboratories,* 293 U. S. 1; *Mumm* v. *Decker & Sons,* 301 U. S. 168, 171.) In the instant Chrysler record there is no relevant evidence whatever to the contrary.

The *per curiam* decision entirely disregards the determinate facts of record set forth in *plaintiffs' draft,* including those as to *novelty and patentable originality* of the subject matter of the invention defined by the claims in suit (findings Nos. 8, 9, 10 and 11, Pr. Trans. 206-209); *utility* of the invention (finding No. 12, Pr. Trans. 209); *presumptions and proofs of the invention* (finding No. 13, Pr. Trans. 210); *infringement and non-avoidance of the charge* (findings 14, 15 and 16, Pr. Trans. 210-212). The complete failure of the defense attempted is treated in findings (Pr. Trans. 213-234).

(26) **The relevant material facts as to each of the nine patents which the defendants introduced, without any other testimony or evidence of any kind,** are taken up and treated in the sequence of the serial numbers of the patents. Proper judicial consideration of the facts demonstrates there is no merit to the vague contentions of defendants' counsel about the conclusive effect in bar of plaintiffs' instant suit against the different Chrysler defendants by reason of the erroneous statements concerning those patents in the opinion of the case against the Studebaker Corporation, *et al.,* 113 Fed. (2nd) 400.

In the instant case against the Chrysler defendants the District Court made no statements concerning said prior dated patents; and the *per curiam* opinion of the Circuit Court of Appeals refers only to the names of patentees and the serial numbers of the patents mentioned in the Studebaker opinion, and entirely disregards

the real *evidence* in the record of the instant case with regard to said patents. Plaintiffs' proofs are the *only* proofs; there is no question of doubt or any "preponderance." Certainly the defense have furnished nothing which even remotely meets the settled requirements of the law which demands "proof beyond a reasonable doubt" to negative the plaintiffs' case and destroy the patented property rights which both the government and the patentee intended to "secure" by the grant of said claims.

Finding No. 18 deals with the Phipps patent (Pr. Trans. 213), No. 19 gives the facts as to the Lefler patent No. 775,831 (Pr. Trans. 215); finding No. 20 deals with Baker patent No. 1,123,065 (Pr. Trans. 215); No. 21 with the Custer patent 1,150,103 (Pr. Trans. 216-218); No. 22 deals with Olsen No. 1,213,241 (Pr. Trans. 218-221); No. 23 with the Parker patents No. 1,294,825 and No. 1,188,353 (Pr. Trans. 221-223); finding No. 24 treats of the fundamental facts as to the R. S. Smith patent No. 1,347,183 (Pr. Trans. 223-229), which was the patent principally referred to in the Studebaker opinion; and finding No. 25 states the relevant determinate facts with regard to the Johnson and Kraner patent No. 1,382,089 (Pr. Trans. 229-231).

(27) **There is not a word in the written specifications of a single one of the prior dated patents which remotely suggests the same improvement inventive idea of the Barry patent in suit, and a glance at the drawings is enough to demonstrate that there is no patentable identity or even resemblance.** The relevant material determinate facts in the record concerning the prior dated patents were overlooked by the said Circuit Court of Appeals *per curiam*. The R. S. Smith patent No. 1,347,183 was the principal patent referred to in the Studebaker opinion. See the facts about this patent in the

Printed Transcript, pages 223-229. The true facts demonstrate that there is nothing in the Smith patent, or in any single one of the said nine prior dated patents, which approaches that degree of certainty constituting "proof beyond a reasonable doubt," which the law requires to prove anticipation or any contrary basis for invalidating the Barry patent in suit. "Validity must be accepted as datum." (*Radio Corporation, et al.* v. *Radio Engineering Laboratories,* 293 U. S. 1, 11.)

(28) **Effect of co-pendency of the patents.** A further point about the prior dated patents in this case, disregarded by the *per curiam* of the Circuit Court of Appeals, is the showing in this record that the Barry patent in suit Smith (Pr. Trans. 223) and Johnston-Kraner patents (Pr. Trans. 231), were pending at the same time in the Patent Office, acted upon by the same Primary Examiners and allowed by the same Chief Examiner. This gives increased force to the Patent Office adjudication of *patentable difference and non-anticipation* of the respective inventions *claimed* and validity of the improvement invention covered by claims 6, 7 and 9 of the Barry patent in suit. (See *Boyd* v. *Janesville Hay Tool Co.,* 158 U. S. 280, at pp. 261, 262.)

(29) **The Studebaker decision was wrong, in facts and law,** it was against different defendants, on a decidedly different record, based on an amazing set of argumentative statements called "findings of fact" and "conclusions of law," and predicated on a veritable brainstorm of incompetent testimony and a large number of alleged models, elaborate colored charts and drawings, and "tests" etc., modifying and changing the construction of the prior patents, and giving their "philosophy of wheels," endeavoring (but failing) to discern the anticipating presence of Barry's patented improvement idea in the said prior patents as modified *nunc pro tunc* by

the defendants' "experts." That was the sort of record on which the courts were misled into adopting the "findings" prepared by counsel for defendants and rendering the manifestly erroneous decision in the *Studebaker* case. (113 Fed. (2d) 400.) *None of that testimony, mass of exhibits, or alleged "evidence" is found in the record of this case. It never should have been admitted in the Studebaker case.* Manifestly the two records are not "substantially identical." The numerous exhibits were withdrawn by defendants more than two years ago, and were not available for any examination at this time.

The difference in the testimony of the experts about the alleged presence of some dotted marks on Smith's patent drawing (113 Fed. (2nd) 400, at pp. 403, 404), is far from being "proof beyond a reasonable doubt" that the same invention on which either claims 6, 7 or 9 of the Barry patent were granted is present in the Smith patent; and, moreover, the function and results of operation are manifestly not the same, as the presence of Smith's "solid metal head pieces" shown in Smith's drawing and the vital feature of the Smith disclosure defeats the Smith patent as a reference. On the face of the statements in the Studebaker opinion resting on the reference to the efforts of the defendants' expert to discern some dotted lines on which he very doubtfully suggests anticipation, that opinion is demonstrated to be wrong, in fact and law, if any regard is to be given to the well settled authoritative rules of patent law. If patented property rights granted by the government after due adjudication by the Patent Office can be negatived and destroyed by that sort of "expert opinion" evidence, then no patent ever issued is safe from its destruction.

Interchangeability, or non-interchangeability, is re-

garded as a very important test in the determination of questions as to novelty and patentable originality, and as to anticipation or infringement. (*Miller* v. *Eagle Mfg. Co.*, 151 U. S. 186, 208; *Prouty* v. *Ruggles*, 41 U. S. 331, 334; *Brooks* v. *Fiske*, 56 U. S. 471 (15 How. 212); *Eames* v. *Godfrey*, 68 U. S. (1 Wall.) 78.) It does not require the testimony of any "expert," a glance at the drawings should be enough to demonstrate the positive certainty that the wheel organizations disclosed in the R. S. Smith patent, or any of the other patents mentioned in the *per curiam* opinion, could not be interchanged or made to anticipate or embody the same structural improvement idea in metal wheels which is disclosed and measured and defined by claims 6, 7 and 9 of the Barry patent in suit, without a complete modification of the prior dated patents, changing physical structural features, discarding parts and features, and then recombining and reconstructing, *nunc pro tunc*, to obtain the improvement invention on which the government granted claims 6, 7 and 9. The law does not permit this. There is not a word in the specifications of the prior dated patents which remotely suggests Barry's improvement idea, or how to accomplish it. The respective inventions are patentably distinct and not patentably identical. The structural provision of means are different, and they do not perform the same work in the same way, nor accomplish the same new and useful results produced by Barry's novel improvement in parts and combinations in such metal wheels.

(30) **The law does not sanction perpetuating and extending the errors and unjust results of such former decisions,** as this Honorable Court has indicated in many cases. Among others, the principle was clearly stated by this Court in a patent case, *Triplatt, et al.* v. *Lowell, et al.*, 297 U. S. 638, 642, that an adjudication adverse to any and all of the claims of a patent in an earlier suit

"is not res judicata and may not be pleaded as a defense" in a later suit, on the same claims, against a different defendant; that "re-litigation of the validity of a patent claim previously held invalid in a suit against a different defendant" is not precluded (p. 644), and that the court having jurisdiction of a *later suit "must determine for itself validity and ownership of the claims asserted, notwithstanding a prior adjudication of invalidity of some of them,* unless those issues have become *res adjudicata* by reason of the fact that both suits are between the same parties or their privies." It is an elemental proposition of law that "the primary duty of every court is to dispose of cases according to the law and the facts; in a word to decide them right" upon the record in the instant suit. (*Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485, 489.)

(31) Both the District Court and the said Circuit Court of Appeals in this case erroneously determined the property rights of the patent owners and decided Federal questions of patent law in a way which is in conflict with constitutional and statutory provisions of law and well settled applicable decisions of the Supreme Court.

(32) Your petitioners after the entry on May 27th, 1942, of the *per curiam* decree of said Circuit Court of Appeals, and within the time required by the rules of said court, to wit, on June 11th, 1942, filed in said Court their petition praying said court to grant a rehearing of said cause, but said petition for a rehearing was on June 15th, 1942, denied by said Circuit Court of Appeals.

B. Petitioners contend that this Honorable Court has jurisdiction pursuant to Section 240 of the Judicial Code to review on writ of certiorari the per curiam decision of said Circuit Court of Appeals in this case upon the following grounds or basis.

First. That said Circuit Court of Appeals denied to petitioners fundamental constitutional rights to a day in court, due process and the equal benefit and protection of the Constitution and laws of the land.

Second. That said Circuit Court of Appeals, and the said District Court, in this case, decided Federal questions of patent law in a way which is in conflict with constitutional and statutory provisions of law and applicable decisions of the Supreme Court.

Third. That said Circuit Court of Appeals disregarded and failed to exercise its appellate jurisdiction, powers and duties in accordance with Section 128 of the Judicial Code, creating the Court of Appeals, whereby the said Court is authorized and commanded to judicially determine the Points in issue and questions presented in the instant case on appeal according to the law and the facts of record in the instant case before said Court of Appeals.

(1) In the instant case said Circuit Court of Appeals failed and arbitrarily refused to review on appeal the judgment or decree of said United States District Court and to judicially determine the Points of Error assigned and questions presented, based upon the actual record before said Court of Appeals in the instant case of plaintiffs against the Chrysler Corporation, *et al.*, defendants.

(2) Said Circuit Court of Appeals did not make a judicial determination of a single point of error or question presented upon this record, or make any reference to

the findings of fact, or conclusions of law, or statements in the District Court opinion, or of any subject matter predicated upon the actual record before said Circuit Court of Appeals in the matter of petitioners' appeal in the instant case against Chrysler Corporation, *et al.*, defendants; and the *per curiam* disposition of the appeal is without due process of law, and is in conflict with applicable decisions of the Supreme Court.

(3) Said Circuit Court of Appeals entirely disregarded the points, questions, findings, conclusions, and actual evidence of record in the instant case, and arbitrarily and superficially considered only the opinion of said Court in an earlier distinctly different case of plaintiffs against The Studebaker Corporation, *et al.*, 113 Fed. (2nd) 400, based upon a materially different record of facts, not before the said Court of Appeals in the instant case against the Chrysler Corporation, *et al.*, and which did not constitute any part of the cause of action before the District Court then pending for review on appeal in the instant case. The said Circuit Court of Appeals arbitrarily and erroneously decided the property rights under the instant appeal in a way which is not sustained by but is contrary to the evidence and is not supported by any authority, but rests solely upon reference to the erroneous opinion in the distinctly different earlier case against the Studebaker Corporation, *et al.*, wherein the parties defendant were different, the actual facts (competent and incompetent) in evidence in the former case are materially different, some different accused infringing devices are involved in this case which were not in issue in the earlier *Studebaker* case,—(wheel exhibit, Pltfs. Exh. 6 containing infringement of claim 6, as well as being an infringement of claims 7 and 9)—and the said prior *Studebaker* case was otherwise wrong in basic facts and the law improperly applied to the actual facts in that record. Petitioners were

given no opportunity to be heard before the said Circuit Court of Appeals with respect to the opinion or record of said prior *Studebaker* case, and the *Studebaker* case was not legitimately involved, considered or discussed in any way, either in record, briefs or arguments, before said Circuit Court of Appeals on the instant appeal.

Fourth. That said Circuit Court of Appeals by its *per curiam* decision herein impaired and deprived petitioners of property rights which the Patent Office duly adjudged and the government secured to the petitioners, the patent owners, by the grant to the patentee of said United States Patent No. 1,422,167; and the action of the said Circuit Court of Appeals in the premises is without due process of law, violates the provisions of the fifth amendment to the Constitution of the United States, and conflicts with applicable decisions of the Supreme Court.

Fifth. That said District Court in this case departed from the established principles of law and erroneously determined the issues and questions presented upon the evidence and actual record before said District Court; and the said Circuit Court of Appeals erroneously sanctioned such departure from the settled principles of law applied to the facts before the District Court by the *per curiam* decision of affirmance, in a way to call for the exercise by this Court of its powers of supervision and correction of both decisions and to direct the entry of an appropriate decree in favor of plaintiffs and against the defendants.

Sixth. That the said District Court erred in failing and arbitrarily refusing to make and enter appropriate findings of fact and state conclusions of law based upon the actual material facts in evidence in the record of this case, which the plaintiffs expressly requested the District Court to make and enter herein, in accordance with statutory provisions and also Rule 52 of the Rules of

Civil Procedure, all as shown in the record and covered by assignments of appropriate points of error. (*Eastman Kodak Co.* v. *Gray*, 292 U. S. 332.) The said Circuit Court of Appeals herein erroneously sanctioned such action of the District Court in the premises, and arbitrarily disregarded the actual facts of record in this case which were legitimately dealt with and are set forth in the said draft of findings of fact and conclusions of law submitted to the District Court by the plaintiffs-appellants and appearing in the record before but disregarded by the Court of Appeals in this case. (Pr. Trans. 205-236.)

Seventh. That the said Circuit Court of Appeals erred in affirming the judgment of the said District Court entered May 20th, 1941.

Eighth. That the said Circuit Court of Appeals erred in not reversing the judgment or decree of said District Court entered May 20th, 1941, as prayed by petitioners.

C. Petitioners represent that the main questions presented for the consideration of this Honorable Court in connection with this application for the issuance of a writ of certiorari to review the per curiam decision of said Circuit Court of Appeals in this case, are the following:

1. Will this Court sanction and approve the departure from the well settled course of appellate judicial procedure which the said Circuit Court of Appeals by its *per curiam* decision has taken and made in determining the property rights of the patent owners entirely disregarding the Points of error and questions presented for judicial determination upon the actual relevant facts of record before said Court of Appeals in this case? Petitioners respectfully submit this Honorable Court should review this case and exercise its power of supervision and correction in the premises.

2. May the said Circuit Court of Appeals entirely disregard the fundamental basic facts of record before said Court in the instant case on appeal, and the established principles of law applicable to the judicial determination of the effect of such facts, and fail or refuse to consider and judicially determine under its appellate jurisdiction pursuant to Section 128 of the Judicial Code any or all of the Points of error and questions presented referable to the actual record before it in the instant case on appeal?

Petitioners respectfully submit that it is elemental to the exercise of the reviewing power of an appellate court that it is authorized and commanded to look only to the actual record before it in the instant case and that it must judicially determine the Points and questions presented upon that record alone. The *per curiam* disposition of the appeal is in conflict with applicable decisions of the Supreme Court. It is devoid of any reference to or support from but is contrary to the evidence of record in this case; it merely reaffirms, perpetuates and extends the errors and unjust results of another case of plaintiffs against different defendants, based upon a decidedly different and incompetent record; and that former record, and the facts and errors thereof, was not before the Court of Appeals, or involved, considered or discussed in any way, in the record, briefs, or argument before the said Circuit Court of Appeals in this case; and petitioners had no opportunity to be heard to demonstrate the errors of plaintiffs' earlier case against the different Studebaker Corporation, *et al.*

3. May the defendants in a patent infringement suit as a defense in the instant case *plead* as an estoppel in bar of plaintiffs' suit, without relevant supporting evidence in the instant record, the *opinion* of the same court in

an earlier case upon the same patent claims, in a former suit by the plaintiffs against other and different defendants, wherein the facts of record are materially different, some different infringing devices being in the instant record and not involved in the earlier case, and a mass of wholly incompetent "evidence" which the different defendants were allowed to introduce, and upon which the argumentative statements called "findings" and the erroneous decision of the former different earlier case is based, is not contained in the actual record of the instant case?

4. May the Circuit Court of Appeals on the appeal of a patent infringement suit disregard the points of error and the actual facts of record before said court submitted for its appellate judicial determination, and accept and in effect approve as an estoppel in bar of plaintiffs' instant suit on the patent the unsupported *pleading* by defendants of "applicability of the rule of *stare decisis*" by reason of an opinion of the same Court of Appeals in an earlier different case against different defendants, based upon a different record, and the instant record not containing any of that great mass of incompetent alleged "evidence," numerous models, elaborate charts and drawings, or "tests," or brainstorm of "expert" testimony about the "philosophy" of wheels, upon which the erroneous decision of the earlier case was predicated? The earlier record was not before the court in the instant case, and was not considered or discussed in record, brief or argument before the Court of Appeals in the instant case.

5. May the District Court in a patent infringement suit fail or refuse to make sufficient, appropriate and correct findings of fact and state conclusions of law thereon, based on the actual, material determinate facts of record in the instant case before said District Court

when requested to do so by a party plaintiff or defendant in said instant case?

6. May the District Court in a patent infringement suit interpolate into the claims in issue before the court any additional implied limitations, which are not required by reason of the disclosure of the valid improvement inventive principle which is measured by the language and terms of the claims as granted, nor required by reason of anything in the state of the art to distinguish from other inventions, and which implied limitations in effect are to be found in other contrasting claims of the patent which are not in issue in the instant case? And may the District Court, when construing the scope and boundaries of the patented property covered and defined by the respective claims in suit, attribute to its implied interpolations the effect of narrowing the boundaries and reducing the scope of the patented property intended to be embraced within and secured by the language of the claims as granted by the government, and thereupon allow the defendants (who unquestionably embody in the accused devices the actual improvement invention), to escape the charge and proof of infringement merely because their wheel devices are not a precise replica of the "one best" applied form thereof shown in the wheel embodiment illustrated in the patent drawing?

7. May the Circuit Court of Appeals by its *per curiam* affirm the erroneous decision of the District Court in the instant case,—(which rested on a misconstruction of the scope and boundaries of the patented property as defined in the claims and dismissed plaintiffs' suit on the grounds of non-infringement because the defendants' accused wheel devices did not embody *two* substantially identical duplicates of the one single dominating particular inventive *part* or *combination* defined by said

claims 7 and 9, respectively, and have the said two "supporting body" *parts telescoped* together, precisely like the assembly shown in the patent drawing),— merely by superficial reference to and *adoption* of an opinion of the same court in another *different case* of plaintiffs against *different defendants,* based upon a materially *different record* of facts, and the former record, or the same facts on which the earlier case was based were not before the said Court of Appeals, or considered and dealt with in record, briefs or argument in connection with the appellate proceedings in the instant case?

8. May the Circuit Court of Appeals arbitrarily fail or refuse to exercise its appellate jurisdiction, powers and duties under the Act creating said court, and deny to petitioners the equal benefit and protection of the laws, disregard the actual fact record before it in the instant case and the Points and questions presented for appellate judicial determination upon that record, and without any testimony or relevant material evidence in the record of the instant case to sustain its decision, without due process of law, without any supporting authority, but in conflict with applicable decisions of the Supreme Court, thereupon affirm the manifestly erroneous decision of the District Court in the instant case, entirely disregarding the instant record of basic facts, and by a *per curiam* reference to the opinion of the same Circuit Court of Appeals in an earlier case of plaintiffs against different defendants, based upon a different record, may the Court of Appeals merely by a *per curiam* adoption of the former opinion rendered in the other different case adjudicate the issues and deprive petitioners of property rights under a patent which had been duly adjudicated by the Patent Office and "secured" to the petitioners, the patent owners, by the government grant to the patentee of claims 6, 7 and 9 of the patent in suit?

D. Petitioners allege the following special and important reasons why, they claim, the writ of certiorari prayed for should be allowed.

First. That the case is sufficiently important to justify and require a review by this Honorable Court is shown by the following, among other, circumstances:

(1) In the foregoing statement of the facts, of the questions presented, and of the grounds and basis of jurisdiction of this Court to issue the writ of certiorari herein, the petitioners have shown a very exceptional state of facts and important reasons why this Court should, in this case, exercise its power of supervision and correction in the premises to secure to the owners of patented property fundamental constitutional rights, due process of law, and the equal benefit and protection of the law of the land. Plain disclosure of the inequity, illegality and injustice of the situation, upon the actual record before the Court, makes a strong basis of appeal to this Honorable Court for the issuance of the writ of certiorari.

(2) Plaintiffs, owners of the patent, were not only entitled to the benefit of the well settled rule of presumption of validity in all respects which attach and follow the grant of the claims by the government after due adjudication and allowance by the Patent Office, but the record in this case definitely shows that the plaintiffs proved an unusually clear case of validity,—novelty, utility and patentable invention,—and also of infringement by the said defendants of claims 6, 7 and 9 of said U. S. Patent No. 1,422,167. There was no testimony for defendants and no relevant evidence whatever to the contrary, or any showing to overcome the presumptions of the law in favor of plaintiffs' case on the patent and the legitimate determinate effect of the proofs. The

per curiam decision of the said Circuit Court of Appeals is not sustained by, but is contrary to, the evidence in this record. It is not, and cannot be, supported by reference to any authority, and it is in conflict with applicable decisions of this Court.

Second. Petitioners contend, and have shown, that the said Circuit Court of Appeals disregarded the controlling provisions of the Judicial Code and the established principles of law affecting its appellate jurisdiction, and failed in the duty under law to make a judicial determination of the Points and questions presented based upon the actual record before said Court of Appeals in the instant case. Will this Honorable Court sanction and approve such non-judicial and erroneous determination of property rights which were measured and entitled to be secured by the grant by the government to the patentee of said claims 6, 7 and 9 of said patent?

(1) The said Circuit Court of Appeals did not judicially examine and determine, or make any reference to, a single point of the errors assigned by petitions upon the actual record in this case, or consider and make any reference to any of the findings of fact or conclusions of law, or as to statements in the opinion of the District Court, or to the briefs and arguments or contentions of the parties to the litigation.

(2) The *per curiam* decision of the Circuit Court of Appeals disregards the actual determinate facts of record in the instant case of plaintiffs against the Chrysler Corporation, *et al.,* and rests solely on the adoption of an opinion in a distinctly different case, wherein the parties defendant were different, the record facts are different, some different accused infringing devices are present and involved in the issues of this case which were not in issue in the said earlier case against the

Studebaker Corporation, *et al.*; and of the testimony and great mass of alleged "evidence," with the numerous models, elaborate colored charts and drawings, erroneously allowed to be introduced by defendants in said earlier *Studebaker* case, *none of that* incompetent and irrelevant alleged "evidence" appears in the record of the instant case against the Chrysler defendants.

Third. The said District Court and the said Circuit Court of Appeals, in the instant case, decided Federal questions of patent law in a way which is in conflict with decisions of the Supreme Court applicable to the determinate effect of the actual material facts of record in the instant case.

Fourth. The said Circuit Court of Appeals by the *per curiam* decision and erroneous action in this case, denied to petitioners their day in court, due process of law, and fundamental constitutional rights to the equal benefit and protection of provisions of the Constitution and laws of the land.

Fifth. That the said Circuit Court of Appeals by its *per curiam* decision in the instant case has, without due process of law, and in violation of the provisions of the fifth amendment to the Constitution of the United States, deprived petitioners of property rights which were legitimately measured and the boundaries defined and secured to the petitioners by the government grant to the said patentee of the said claims 6, 7 and 9, respectively, of the said United States Patent No. 1,422,167.

Sixth. That the said Circuit Court of Appeals by its *per curiam* decision in the matter of the appeal upon the record in the instant case has so far departed from the settled course of appellate judicial proceedings, due process of law, and from the principles of law established by decisions of the Supreme Court, in a way which calls for the exercise by this Honorable Court of its power of

supervision and correction in the premises by issuance of the writ of certiorari herein.

Seventh. Petitioners contend that the said Circuit Court of Appeals erred in affirming the judgment of said District Court in this case.

Eighth. Petitioners contend that the said Circuit Court of Appeals erred in not reversing the judgment or decree of the said District Court entered in this case, as prayed by the petitioners.

(E) Your petitioners present herewith, as a part of their petition, a certified transcript of the record in the Circuit Court of Appeals for the Seventh Circuit and all proceedings therein, together with proof of service of notice of submission of this petition conformably to the rules of this court.

Wherefore your petitioners respectfully pray that a writ of Certiorari be issued out of and under the seal of this Honorable Court directed to said United States Circuit Court of Appeals for the Seventh Circuit commanding said court to certify and send to this Honorable Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said United States Circuit Court of Appeals for the Seventh Circuit in this cause which was entitled in that court, "Gerald G. Barry and Georgiana G. Barry, Plaintiffs-Appellants, *vs.* Chrysler Corporation, Chrysler Sales Corporation, Chrysler Motor Parts Corporation, Chrysler Illinois Company, and Dodge Brothers Corporation, Defendants-Appellees, and Budd Wheel Company, Intervenor-defendants-appellee," (No. 7827), to the end that said cause may be reviewed and determined as provided by law and that your petitioners may have

such other and further relief or remedy in the premises as to this Honorable Court may seem appropriate, and that said judgment of said United States Circuit Court of Appeals for the Seventh Circuit may be reversed by this Honorable Court and the judgment of said District Court reversed, or that the petitioners may have such other relief in the premises as the case presented by the record may justify.

GERALD G. BARRY AND
GEORGIANA G. BARRY,
Petitioners,

By ..... and
PATRICK J. LUCEY,

.....
GERALD G. BARRY,
Their Attorneys.

State of Illinois, } ss.
County of Cook. }

Patrick J. Lucey and Gerald G. Barry each being duly sworn according to law, on oath, respectively, say:

I am one of the attorneys for Gerald G. Barry and Georgiana G. Barry, the petitioners herein, and authorized to represent the said petitioners herein.

We have prepared the foregoing petition and the statements therein are true of our own knowledge and belief and we verily believe the case is one in which the prayer of the petitioners should be granted by this Honorable Court.

.....
PATRICK J. LUCEY,

.....
GERALD G. BARRY.

Subscribed and sworn to before
me this 5th day of September, 1942.

CHARLES D. TIDHOLM,
Notary Public

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 7827. OCTOBER TERM, 1941, APRIL SESSION, 1942.

GERALD G. BARRY and GEORGIANA G. BARRY,
Plaintiffs-Appellants,

vs.

CHRYSLER CORPORATION, CHRYSLER SALES CORPORATION, CHRYSLER MOTOR PARTS CORPORATION, CHRYSLER ILLINOIS COMPANY, and DODGE BROTHERS CORPORATION,
Defendants-Appellees,

and

BUDD WHEEL COMPANY,
Intervenor-Defendant-Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

May 27, 1942.

Before EVANS, KERNER, *Circuit Judges,* and LINDLEY, *District Judge.*

Per Curiam:

Plaintiffs appeal from a judgment dismissing for want of equity their complaint for infringement of Claims 5, 6, 7, and 9 of patent to Barry, number 1,422,167.

In *Barry, et al.* v. *Studebaker,* 113 Fed. (2) 400, this court held the same claims invalid for want of invention.

We have re-examined the record in that cause and carefully scrutinized the one presented here. Plaintiffs relied upon the same claims in each cause; they offered the testimony of the same patent expert substantially

to the same effect in each. The same prior art was presented. So far as validity is in controversy the records are substantially identical.

Plaintiffs assert at great length that both the District Court and this court were wrong in the prior case, and attempt now to relitigate the issue of validity. Careful examination of the patent, in the light of Lefler, 775,831; Johnston and Kraner, 1,382,089; Olsen, 1,213,241; Parker, 1,294,825; Smith, 1,347,183; Baker, 1,123,065; Phipps, 735,812 and Custer, 1,150,103 is convincing that we were not in error in our previous decision. We adopt the analysis made by Judge Treanor and agree that no originality or novelty is disclosed in the claims relied upon.

The judgment is

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

SEP 30 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 393

GERALD G. BARRY AND GEORGIANA G. BARRY,
Petitioners,

vs.

CHRYSLER CORPORATION, CHRYSLER SALES CORPORATION, CHRYSLER MOTOR PARTS CORPORATION, CHRYSLER ILLINOIS COMPANY, DODGE BROTHERS CORPORATION, AND BUDD WHEEL COMPANY,
Respondents.

RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

FRANK PARKER DAVIS,
ARTHUR C. BEAUMONT,
Counsel for Respondents.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

We deem it quite unnecessary to reply to this petition *in extenso*. We cannot discover in the fifty-odd printed pages any clear-cut ground for review by this Court. None of the reasons of the rule (Rule 38) exists nor any other to be found in opinions of this Court in patent cases where the writ has been granted. The petition appears to us to consist mainly of a jumble of generalities together with rather serious charges of dereliction of duty on the part of the judiciary of the Seventh Circuit. Examination of the

record in the instant case, or in the prior case of these petitioners against The Studebaker Corporation, *et al.*, will show that these charges are wholly unjustified; also that the petition is peppered with wholly erroneous statements concerning defendants' position and what was before the Courts on their behalf. We deem it unnecessary to point out specifically the numerous statements of this character,—the baselessness whereof will be quite apparent.

The frame of the petition is such as not even to give a very clear explanation of the history of the litigation so we think it may be well for us to state the same succinctly.

The Complaint in the instant case was filed shortly after a similar Complaint had been filed against The Studebaker Corporation, *et al.*, and remained in a state of suspension pending the outcome of the latter. The Studebaker case went to trial before Judge Wilkerson who found for defendants on both issues of validity and infringement.* On appeal his decree of dismissal for want of equity was affirmed, more particularly upon the issue of validity (111 F. (2d) 400). The opinion on appeal (Circuit Judges Major, Treanor and Kerner), after painstaking exposition of the nature of the disclosure of the patent in suit, and of the accused constructions, followed by detailed analysis of a number of prior art patents, concluded as follows:

> "If the Barry patent is broad enough to read upon defendants' structure, which is of the single metal stamping type, we think it is clearly anticipated by the prior art of Smith and Olsen.
>
> "In view of the prior art disclosed in the various patents, we conclude that claims 5, 6, 7 and 9 of the Barry patent in suit involve neither originality nor novelty in the art and are invalid for want of invention."

* The transcript brought up is incomplete. It unwarrantedly omits Judge Wilkerson's findings of fact and conclusions of law and decree, also the opinion on appeal; and even the file history of the patent in suit, Plaintiffs' Exhibit No. 3; all of which were in the printed transcript below.

Petition for rehearing was denied.

In the instant case the same claims were specified as in the Studebaker case and two of the three accused structures were identical with those accused in the Studebaker case. A third structure differed slightly from one of these two.

The issues in the instant case were settled at a pre-trial conference as follows:

> "1. Validity of claims 5, 6, 7 and 9 of the patent in suit.
>
> "2. Infringement of claims 5 and 6 by wheel construction exemplified by Defendants' Interrogatory Exhibit No. 2.
>
> "3. Infringement of claims 7 and 9 by each of wheel constructions exemplified respectively by Plaintiffs' Exhibit B, Defendants' Interrogatory Exhibit No. 1, and Defendants' Interrogatory Exhibit No. 2.
>
> "4. Applicability of rule of *stare decisis* by reason of claims 5, 6, 7 and 9 of the patent in suit having been held to be invalid in the suit of these plaintiffs against The Studebaker Corporation, *et al.*, No. 15,265 in this Court and No. 6961 in the Court of Appeals of this Circuit." (Trans. Rec. p. 25.)

The case went to trial before Judge Barnes, who did not rule upon the stated issue of applicability of the rule of *stare decisis*, or upon the issue of validity, but confined his opinion to the issue of infringement upon which he held against plaintiff. (Tr. Rec. 238; 49 U. S. P. Q. 445.)

Upon appeal in the instant case the judgment was affirmed (Circuit Judges Evans and Kerner, and District Judge Lindley), the opinion, having reference to the preceding case, reading:

> "We have re-examined the record in that cause and carefully scrutinized the one presented here. Plaintiffs relied upon the same claims in each cause; they offered the testimony of the same patent expert substantially to the same effect in each. The same prior

art was presented. So far as validity is in controversy the records are substantially identical.

"Plaintiffs assert at great length that both the District Court and this court were wrong in the prior case, and attempt now to relitigate the issue of validity. Careful examination of the patent, in the light of Lefler, 775,831; Johnston and Kraner, 1,382,089; Olsen, 1,213,241; Parker, 1,294,825; Smith, 1,347,183; Baker, 1,123,065; Phipps, 735,812 and Custer 1,150,103 is convincing that we were not in error in our previous decision. We adopt the analysis made by Judge Treanor and agree that no originality or novelty is disclosed in the claims relied upon." (Tr. Rec. 321; 128 F. (2d) 618.)

Thus the cause of action has had the attention and scrutiny of two judges holding District Court (Judges Wilkerson and Barnes), and five judges on appeal,—four circuit judges (Judges Evans, Major, Treanor and Kerner who sat on both appeals) and another district judge (Judge Lindley),—seven in all, with decisions in every instance against petitioners and no dissent by any appellate judge.

There is nothing exceptional about this litigation,—save perhaps the persistence of petitioners in their attempt to re-litigate precisely the same issues that had already been decided against them by the same Courts,—and it must be perfectly self-evident that no unsettled question of law is involved.

Basically the litigation is merely ordinary patent infringement litigation with the usual issues of validity and infringement. There is present no question of public interest. It is merely a private controversy which has no element about it whatever to suggest a reason for issuance of the writ prayed for, or which even justifies this Court's being burdened with consideration of a petition for the writ.

The petition is merely the wail of a defeated litigant and an embittered lawyer-patentee who cannot or will not

see that his purported invention did not entitle him to a monopoly of any such scope as that contended for. He does not understand, or perversely will not recognize, that the presumption of validity attending the grant of letters patent is rebuttable by showing a prior state of the art overlooked by the Patent Office when granting him such claims as those declared upon.

We submit in conclusion that the petition is wholly without merit and should be denied.

Respectfully submitted,

FRANK PARKER DAVIS,
ARTHUR C. BEAUMONT,
Counsel for Respondents.

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Respondents.

MOTION BY PETITIONERS TO VACATE AND SET ASIDE ORDER OF OCTOBER 26, 1942, WHICH DENIED THEIR APPLICATION FOR WRIT OF CERTIORARI, AND, THEREUPON, TO RECONSIDER AND GRANT THE PETITION OR, IN THE ALTERNATIVE, OTHER RELIEF; AND GROUNDS IN SUPPORT OF THIS MOTION

PATRICK J. LUCEY,
GERALD G. BARRY,
Attorneys for Petitioners.

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And now come said Gerald G. Barry and Georgiana G. Barry, petitioners in the above entitled cause, and respectfully move the Court to vacate and set aside the order entered herein October 26, 1942, which denied said petitioners' application for writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, and petitioners humbly pray this Honorable Court for a reconsideration of the order, and, thereupon,

grant the prayer of the petition, or, in the alternative, that this Honorable Court enter an order, reversing the judgment of said Court of Appeals, and remanding to said Court with directions to proceed in accordance with the grounds presented by petitioners.

And as grounds in support of this motion petitioners respectfully show:

I.

As the said Circuit Court of Appeals filed no opinion, other than a one-paragraph *per curiam* opinion, is such a review by said Appellate Court within the guarantee of the due process clause of the Fifth Amendment to the Constitution of the United States, in view of the peculiar nature of this record, wherein was presented the unusual picture of a per curiam decision which did not consider or judicially determine a single one of the Points of Error, or questions presented upon the actual record of the instant case on appeal?

The *per curiam* decision of said Court of Appeals rests solely upon a superficial reference to the opinion and the adoption of an erroneous opinion upon unrelated issues, rendered in an earlier case of plaintiffs against different defendants, upon a decidedly different record. The instant record includes some distinctly different accused devices, *which were not involved or before the courts* in the earlier *Studebaker* case; and the record of the instant case on appeal is not only devoid of any testimony for defendants, or any relevant, material evidence to the contrary of the very clear and sufficient proofs of validity and infringement established by the plaintiffs, or of any showing of facts or law to overcome the effect of the well settled rule of presumption of validity of the said claims 6, 7 and 9, in suit, which attach and result from the *grant* of the said claims by the govern-

ment *after* due proceedings in and *adjudication* by the Patent Office, but, moreover, **the instant record does not contain any of a great mass of wholly incompetent testimony and "evidence," numerous models, charts, elaborate colored drawings, etc. which was present, but never should have been admitted in the earlier case, and upon which the Studebaker opinion was predicated.** *That same "evidence," or the record of the earlier Studebaker case, was not presented before either the District Court or the Court of appeals, nor considered in any way in connection with the Points of Error or questions presented,* either in the record, briefs or argument, before the said Circuit Court of Appeals *in the instant Chrysler* case. In the *Chrysler* case the attempted defense was a complete failure. **Defendants relied solely on the naked pleading of "applicability of the rule of stare decisis"** by reason of the erroneous opinion in the earlier *Studebaker* case; and the *per curiam* opinion of the Court of Appeals rests on approval of that "plea," without any evidence in the record or supporting authority.

Manifestly, petitioners were denied the equal benefit and protection of the laws, and deprived of the valid patented property rights, measured and defined by the government grant of the claims in issue, without due process of law guaranteed by the Constitution. The decisions are in conflict with numerous applicable decisions of this Honorable Court; and the decisions have not been and cannot be sustained by reference to any authority.

II.

Does not this record present a peculiar and erroneous application of the rule of *stare decisis* by reason of defendants' *pleading* (without any evidence or authority in support of their *pleading*), the opinion in an earlier

case between different parties, involving different subject matter, and a manifestly different record? Does not this situation present a basis or ground within the category of grounds for allowance of petitioners' application for certiorari herein?

III.

As a rule of guidance in future cases, would not an expression of opinion by this Honorable Court, clearly defining the instances wherein a Federal court in a patent infringement case, in arriving at a decision therein, may consider *records* in unrelated cases, between different parties, and different subject matter, and the opinion of this Court serve as a guide in future controversies, in view of the uncertainty of the *per curiam* opinion on this point, as disclosed in the petition for certiorari on file herein?

IV.

It is most respectfully urged that the denial of the petition for certiorari deprived the petitioners of the benefit of the rule of law handed down by this Honorable Court in the case of *Triplatt, et al.* v. *Lowell, et al.*, 297 U. S. 638, and creates a conflict with the doctrine laid down in that case, wherein it was held that an adjudication adverse to any and all of the claims of a patent in an earlier suit "is not *res judicata* and may not be pleaded as a defense" in a later suit, on the same claims, against a different defendant; that "relitigation of the validity of a patent claim previously held invalid in a suit against a different defendant" *is not precluded* (p. 644), and that the court having jurisdiction of a later suit "must determine for itself validity and ownership of the claims asserted, notwithstanding a prior adjudication of invalidity of some of them, unless those issues have become *res adjudicata* by reason of the fact

that both suits are between the same parties or their privies." Petitioners further respectfully submit that it is regarded as fundamental to the exercise of the reviewing power of any appellate court that it is authorized and commanded to look only to the actual record before it in the instant case on appeal, and that it must judicially determine the Points and questions presented *upon that record alone.* The unusual *per curiam* opinion in the instant *Chrysler* case does not consider or decide a single one of the Points or questions presented, referable to any of the findings or evidence of record in the instant case, but the per curiam decision is erroneously based on different grounds, not found in any of the points in this record, nor sustained by any evidence, or supported by any authority.

V.

Would it not serve as a rule of guidance in future cases if this Honorable Court were to clarify the law so that litigants would know whether the *Triplatt* case was still the rule of decision of this Honorable Court or has been impliedly superseded?

VI.

As a rule of guidance in future cases petitioners most respectfully submit that the instant record presents a situation which, in their humble opinion, merits expression of opinion by this Honorable Court, defining and settling as a rule of practice and procedure what is the purpose and effect of "findings of fact" and of "conclusions of law," submitted in a patent infringement case, pursuant to Rule 52 of the Federal Rules of Civil Procedure, following the statutory provisions, and in view of decisions of this Court, such as *Eastman Kodak Co.* v. *Gray,* 292 U. S. 332. It is most respectfully urged that the denial of the petition for certiorari, in view of the

points and presentation of the question upon this record, creates a conflict with the wise purpose of the rules and the doctrine of the law laid down in applicable decisions of this Honorable Court.

VII.

In view of the exceptional nature of the *per curiam* opinion it was deemed necessary for the petitioners to support the jurisdictional grounds by reference to the *essential* facts as we have in the petition, in order to comply with the rulings of this Court that a petition for certiorari should make a *clear, definite* and *complete disclosure concerning the controversy,* since it is impossible for the court critically to examine the record before ruling on the application. (*Southern Power Co.* v. *North Carolina Public Service Co.,* 263 U. S. 508.)

Petitioners humbly pray that this Honorable Court reconsider the record and petition for certiorari herein, vacate and set aside the order which denied the application, and upon reconsideration of said petition grant certiorari.

In the alternative, petitioners pray that the order denying the petition for certiorari be vacated and set aside, and that an order be entered by this Honorable Court, reversing the judgment of said United States Circuit Court of Appeals for the Seventh Circuit, with directions to said court to proceed in accordance with the grounds presented by petitioners.

Most respectfully submitted,

PATRICK J. LUCEY, and
GERALD G. BARRY,
Attorneys for Petitioners.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

Patrick J. Lucey and Gerald G. Barry, each being duly sworn according to law, on oath, respectively say:

The foregoing motion by petitioners to vacate and set aside the order of October 26, 1942, which denied the petition for certiorari herein, and to reconsider and thereupon grant the petition for certiorari, or alternative relief, and the grounds stated in support of petitioners' motion, are presented in good faith and not for delay; and we verily believe the case is one in which the said motion and prayer of the petitioners should be granted by this Honorable Court.

.....

.....

Subscribed and sworn to
before me this.....day of
November, 1942.

.....
Notary Public.